80-698

No. ——

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NEWSPAPER PRINTING CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

—and—

TULSA TYPOGRAPHICAL UNION, LOCAL NO. 403,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in converting to new technology which inherently blurs traditional work flow and assignments among separate employee groups, an employer bargaining in subjective good faith, who declines to readopt old collective bargaining agreement language combining an exclusive grant of work jurisdiction with an open-ended definition of the bargaining unit and instead proposes and insists to impasse upon contract language which is consistent both with the realities of the parties' historical working relationship and the impact of the new technology on work flow and which does not impose representational choices upon employees who have not selected the bargaining union as their representative, nevertheless violates the National Labor Relations Act.

2. Whether an employer found by the National Relations Board to have refused to bargain in good faith may be ordered to agree verbatim to old collective bargaining agreement language encompassing both mandatory and permissive subjects of bargaining.

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A. The contract language proposed by Petitioner lawfully accommodated the historical working relationship between the parties with policies deeply rooted in the National Labor Relations Act—the self-determination rights of its other employees and its own right to preserve management prerogatives in the face of new technology adopted for valid business reasons. Petitioner's insistence to impasse upon that language and correlative refusal to reaffirm obsolete language verbatim did not *per se* amount to a refusal to bargain in good faith. The contrary decision below conflicts with the application of those core labor relations policies by this Court and other courts of appeal	19

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B. The jurisdiction-unit clause of the expired collective bargaining agreement deals directly with substantive terms and conditions of employment which are mandatory subjects of collective bargaining. The judgment below enforces a Board order compelling Petitioner to reaffirm that language verbatim, thereby forcing agreement to substantive contractual provisions. The decision below thus squarely conflicts with this Court's seminal decision in *H. K. Porter Co.* v. *N.L.R.B.*, 397 U.S. 99 (1970) 26

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TULSA TYPOGRAPHICAL UNION, LOCAL NO. 403,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Newspaper Printing Corporation respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit in the above entitled case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 625 F.2d 956 (1980) and is reprinted in the Appendix hereto at pp. 1a-22a. The Decision and Order of the National Labor Relations Board, enforced by the Court of Appeals, is reported at 232 N.L.R.B. 291 (1977) and is reprinted in the Appendix hereto at pp. 23a-30a. The Decision of the Administrative Law Judge is annexed to

that Decision and Order commencing at 232 N.L.R.B. 293 and is reprinted in the Appendix hereto at pp. 31a-98a.

JURISDICTION

The opinion of the Court of Appeals was rendered on May 19, 1980. Thereafter, a timely petition for panel rehearing and suggestion for rehearing *en banc* was denied on September 9, 1980, and judgment was entered on that date. (App. 99a-102a). By order dated September 29, 1980, the court below recalled its mandate. (App. 103a-104a). This petition for certiorari was filed within 90 days of entry of the order denying the petition for rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

§ 158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

. . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of

. . . .

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;

. . . .

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

. . . .

STATEMENT OF THE CASE

Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit which ordered enforcement of a decision and order of the National Labor Relations Board. To facilitate an understanding of the important issues implicated in this case, before reciting the underlying facts

material to consideration of the questions presented, petitioner will briefly overview the historical background of technological development in the printing industry. Petitioner will also trace the course of the administrative and judicial proceedings below.

A. Historical Overview

For more than four hundred years after the invention of movable type, generally attributed to Johann Gutenberg, *circa* 1450 A.D., there were no material changes in the methods of printing. The industrial revolution brought with it, however, two innovations which dramatically increased the volume of production—the rotary press and the linecasting machine. These developments made possible the newspaper's role as the first truly mass medium of communication, reaching many thousands of readers on a daily basis.

As the newspaper industry entered the twentieth century, the basic so-called "hot metal" letterpress printing process was firmly established. That system essentially divided newspaper production work into four phases—copy generation, typesetting, plate-making, and press operation. "Copy," that is the text and pictorial matter to appear in print, would be created and revised by advertising department personnel and editorial department personnel, the latter being responsible for news stories, features, and all other nonadvertising matter. The tangible form of text copy, a typescript, would then be physically sent to the department known as the "composing room," together with a specification of the format in which the item was to be run. There, the text would be cast into metal type by means of a linecasting machine which melted lead alloy into lines of type as directed by the machine operator. The linecasting machine operator performed essentially a dual function—"rekeyboarding" the text, thereby converting its tangible form from two to three dimensions (typescript to raised metal

type) and determining the spacing of letters and words and the hypenation of words which must be split on to two lines so as to produce justified lines of type. While the former function required a certain degree of manual dexterity, it is the latter which embodied the traditional skills of the typesetter's craft.

The cast lines of type were then assembled and locked into wooden frames known as "chases" in the form of "dummy pages," corresponding to each page of the newspaper to be printed. The great mass and flat form of the dummy pages were, however, unsuitable for direct use on the high speed cylindrical rolls of a newspaper's high speed rotary presses. They were accordingly used to make the thin semi-cylindrical press plates by a process known as stereotyping, whereby the assembled metal type was used to physically deform a flexible stereotype matrix to exactly reproduce the dummy page. The matrix would then be bent to conform to the diameter of the press cylinders and used as a mold into which molten lead alloy was forced to make the actual plates.

In the actual press run, the plates were mounted on the press cylinders and newsprint fed to the press in roll form, thereby producing the pages of the newspaper. The continuous webs of pages printed by the press were simultaneously assembled, folded, and cut to form the finished product, ready for distribution.

Over the years, a number of refinements have been made in composing room operations, the effect of which has been to automate the typesetting functions of composing room personnel. For example, linecasting machines were modified to accept perforated paper tape input in lieu of direct "keyboarding," thereby permitting several operators at separate keyboard stations to produce tape to be fed to a single linecasting machine. While productivity increased, hypenation and justification decisions were still made by skilled typesetters. Then

special purpose computers were developed which were programmed to convert a perforated tape on which a raw stream of text had been encoded (known as "idiot tape") into hypenated and justified tape which could be fed directly to a linecasting machine. Although the idiot tapes were initially prepared by rekeyboarding typescript, optical character recognition ["OCR"] equipment was thereafter developed which was capable of reading the typescript directly and converting the text to electrical impulses from which idiot tapes could be generated or which could be electronically transmitted directly to the typesetting computer. The traditional material transformations of the hot metal indirect process (text to metal type to metal printing plate) were not directly affected by these innovations.

In recent years however, technological developments have shaken the very foundation of traditional production. With the advent of the "cold type" process, combining photocomposition [1] and direct printing, cast metal type and printing plates became obsolete in the high volume environment of the newspaper printing plant. Photocomposition equipment electronically and optically produces properly formatted copy in "camera ready" form. This camera ready copy may be cut and pasted on to dummy pages and then optically reproduced directly on photosensitive press plates. The direct printing process eliminates the need for large numbers of skilled craftsmen, for the camera equipment is highly automated. Moreover, the typesetting computer technology developed to drive linecasting machinery has been

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[1] "The term 'photocomposition' appears to be the current word of art to describe virtually all types of document composition through use of modern photographic processes. Type matter that is 'photocomposed' is usually set by a computerized process that makes the type indistinguishable to the naked eye from 'hot type' set in the traditional typographic method." B. Boskey and E. Gressman, The Supreme Court's New Rules for the Eighties, 85 F.R.D. 487, 493 n.11 (1980).

adapted to photocomposition equipment. Indeed, entire pages can be photocomposed by computer.

Inherent in the hot metal process were a number of operational and safety drawbacks. The equipment was bulky, noisy, and emitted noxious lead fumes; there was the ever present danger of spilled molten metal. The massive assembled dummy pages and raised metal press plates were difficult to handle safely and exposed workers to contact with lead. These problems were eliminated by use of cold type equipment and processes.

Finally, computer technology has developed the "front end system" whereby editorial and advertising department personnel no longer create any tangible form of copy. Video display terminal ["VDT"] units each consisting of a keyboard and display screen have now replaced typewriters. The VDT units are connected to a central general purpose high speed digital computer which receives and stores the copy as it is created and converted into electrical impulses at the writer's keyboard. Thereafter rewriting and editing operations can be performed by recalling the copy on the video screen and entering the revisions through the keyboard. The final creative product is then electronically transmitted to photocomposition equipment to be made up into press plates.[2] Thus, the traditional craft functions of typesetters and stereotypers—the conversion of copy from one tangible form to another—have been automated out of existence.

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[2] In addition to the word processing and typesetting functions described in the text, the general purpose computer could be programmed to automate billing and other business needs of the publisher. While these operations are done on a time-shared basis, the computer operates with split-second speed, giving each user the appearance of instantaneous operation. Scores of VDT units can be simultaneously used by employees working in various departments of the newspaper facility.

The foregoing has been, of necessity, somewhat simplified and generalized. The development of printing technology is discussed more comprehensively in the trade literature and, to the extent labor-management controversies have ensued, in reported decisions of the courts and the National Labor Relations Board. *See generally, e.g., Omaha Typographical Union, Local No. 190* v. *N.L.R.B.*, 545 F.2d 1138 (8th Cir. 1976); *Graphic Arts International Union* v. *N.L.R.B.*, 505 F.2d 335 (D.C. Cir. 1974); *N.L.R.B.* v. *Columbia Tribune Publishing Co.*, 495 F.2d 1384 (8th Cir. 1974); *Newspaper Guild of New York, Local 3*, 249 N.L.R.B. No. 135 (1980); *Muncie Typographical Union No. 332*, 235 N.L.R.B. 874 (1978); 2 International Typographical Union, *Lessons in Printing* 1-6 (1972); A. Woods, *Modern Newspaper Production* 42-132 (1963); 3 International Typographical Union, *Lessons in Printing* 3-23 (1956); W. Mengel, *Ottmar Mergenthaler and the Printing Revolution* (1954).

B. The Underlying Controversy

The essential facts, which are not in material dispute, are summarized in the reported opinion of the court below in a section entitled "The factual background." (625 F.2d at 958-61; App. 2a-10a). The administrative law judge's decision sets forth the pertinent facts in more detail (232 N.L.R.B. at 294-303; App. 33a-66a).

Petitioner Newspaper Printing Corporation ["NPC"] is an Oklahoma corporation maintaining its office, printing facilities, and principal place of business in Tulsa, Oklahoma. As agent for two daily newspaper publishers, NPC prints, solicits advertising, produces and distributes the *Tulsa Tribune* and the *Tulsa World*. Tulsa Typographical Union, Local No. 403 ["Union"], a subordinate local of the International Typographical Union, is one of several labor organizations representing those NPC employees who have chosen union representation. The Union repre-

sents NPC's composing room employees and has maintained a collective bargaining relationship with NPC since 1905. The last collective bargaining agreement between NPC and the Union extended from February 1, 1973 to January 31, 1976. This case arises out of negotiations undertaken in 1975 and 1976 for a new agreement to replace the one then expiring.

Prior to the commencement of negotiations in the fall of 1975, NPC printed the *Tulsa World* and *Tulsa Tribune* primarily by the hot metal process.[3] The negotiations coincided, however, with two external events which made it impractical for NPC to continue utilizing hot metal printing. The Occupational Safety and Health Administration had determined that NPC's hot metal equipment violated its standards and had commenced enforcement proceedings against NPC. Shortly thereafter, NPC was notified that replacement parts for its hot metal equipment would no longer be stocked in this country. (232 N.L.R.B. at 295; App. 37a)

Forced to abandon hot metal printing, NPC sought to implement in early 1976 a major technological change—total conversion to the modern computerized cold-type process.

> "The first phase, which was to be completed by September, 1976, entailed the total conversion of the composing room to 'cold type.' . . . The second phase envisioned installation of a large and complex general-purpose computer system which would be used in conjunction with phototypesetting work and also for billing and other business purposes. Lastly, both the newsroom and classified advertising room would be connected to the computer system by means

[3] The bulk of typesetting work was performed on linecasting and other hot metal equipment. NPC did, however, utilize some photocomposition and associated special purpose computer equipment in the composing room. (232 N.L.R.B. at 297; App. 44a-45a)

> of video display terminals. This would enable newspaper copy (ads or news articles) to be electronically transmitted directly from the newsroom and classified ad room terminals to the general purpose computer for storage and recall. The estimated time of completion of the latter two phases was May, 1977, and August 1, 1977, respectively." (625 F.2d at 959 n. 4; App. 4a-5a).

Thus, it would not be necessary to "rekeyboard" typewritten news and advertising copy created in those departments into the photocomposition equipment, which replaced the linecasting machines in the composing room. Keyboarding would be performed only once, by the person who originally created the newspaper copy in a department remote from the composing room. The necessity of employing skilled personnel to perform these functions in the composing room would thereby be obviated. The Union had never been certified or voluntarily recognized as the collective bargaining representative of newsroom or classified advertising room employees.

In negotiation sessions held during November and December of 1975 and January of 1976, NPC and Union negotiators focused upon changes which NPC's planned conversion was certain to entail. NPC wished complete flexibility in placing the new equipment in its various operation departments and in making work assignments to various employee groups. The Union, on the other hand, was concerned about the loss of jobs resulting from the automation of composing room functions and the concomitant need for fewer and less skilled employees to perform the remaining composing room functions.

The then-expiring collective bargaining agreement contained a so-called "jurisdiction-unit" provision which recited that

> "Jurisdiction of the Union and the appropriate unit for collective bargaining is defined as includ-

> ing all composing room work and includes [certain listed job] classifications. . . . The employer shall make no other contract covering work as described above, which shall be performed only by journeymen and apprentices, especially no contract using the word 'Stripping' to cover any of the work above mentioned." (232 N.L.R.B. at 294 n. 1; App. 34a).

The Union sought to have this language renewed verbatim, recognizing that it imposed limits upon NPC's ability to install new video display terminal units in other departments, where the Union did not represent the employees who would operate the new equipment, and its ability to assign employees in those departments to perform work thereon.

NPC drafted a proposed amendment of this provision essentially expressed in the following language:

> "The jurisdiction of the Union and the appropriate unit for collective bargaining is defined as including only those employees engaged in all work which the Employer may from time to time designate to be performed in the Composing Room. It is the express intention of the Employer to accomplish his complete production needs in the manner which he determines to be the most effective and economical method to fulfill the work requirements." (625 F.2d at 959, App. 5a.

As NPC's negotiator explained, this language was designed to allow NPC the freedom from contractual restraints upon its right to implement the new technology. In view of its significant capital investment in the new machinery and processes, NPC sought complete flexibility in assigning jobs, in placing the new equipment in various departmental locations, and in determining who would operate it. NPC explained to the Union that it was not attempting to limit the Union's historic work jurisdiction which would continue to be commensurate

with the physical boundaries of the composing room. Although numerous other contract proposals were discussed in these meetings and during the course of subsequent negotiations, the parties' major efforts focused upon resolution of the jurisdiction issue and the impact of the new technology upon bargaining unit employees.

Shortly before the expiration date of the existing agreement, NPC presented the Union with a letter requesting to be notified on or before January 30, 1976 as to whether the Union would accept or reject NPC's proposals. Absent acceptance NPC would withdraw its proposals and submit a counterproposal on February 1. The subject of job guarantees for unit employees was discussed but the jurisdiction issue remained unresolved at that session and on the following day.

Having received no response from the Union to that letter, on February 2, 1976, NPC sent a letter to the Union announcing the establishment of certain "working conditions" to remain in effect pending the consummation of a new agreement. The announcements particularly relevant to this proceeding were expressed in the following words:

> "Mr. Robert Melton, President
> Tulsa Typographical Union #403
> P.O. Box 44
> Tulsa, Oklahoma 74102
>
> "Dear Bob:
>
> "In light of the fact that the contract with your Union expired by its terms and notification on January 31, 1976, and pending execution of a new agreement or a continuation of the existing impasse, no provision, past practices or obligations that existed under the prior contract will be effective.
>
> "We announce the following work relationships that will exist not as a contractual understanding but work practices as follows:

"*Wages*: Unchanged.

"*Hours*: Work will continue to be performed as presently scheduled including lunch periods, holidays, and vacations.

"*Working Conditions*: It is the express intention of the Employer to accomplish his complete production needs in the manner which he determines to be the most effective and economical method to fulfill the work requirements.

"In this connection, Management shall exercise the right to cease any procedure or remove any equipment from the composing Room, in the interest of efficiency.

"No duplication of work will be performed between departments, or employees, and should this occur, the Employer shall determine who will do the work.

* * * *

"This is not to the prejudice of the use of the collective bargaining process to reach a new agreement.

"Sincerely,

"Newspaper Printing Corporation

/s/ Kenneth S. Fleming
Vice President/General Manager"

(232 N.L.R.B. at 311; App. 96a-98a).

C. The Administrative Proceedings Below

The Union subsequently filed an unfair labor practice charge, upon which the National Labor Relations Board ["Board"] issued a Complaint alleging that NPC had failed to bargain with the Union in good faith in violation of Sections 8(a)(1) and (5) of the National Labor Relations Act, as amended ["Act"], 29 U.S.C. §§ 158(a)

(1) and (5) in an appropriate unit for collective bargaining consisting of

> "[a]ll composing room employees of Respondent employed at its Tulsa, Oklahoma, facility, including operators, makeup men, advertising makeup men, markup men, machinists, proofreaders, teletype operators, monotype operators, and apprentices, excluding office clerical employees, guards, watchmen and supervisors as defined in the Act, constitute an appropriate unit for the purpose of collective bargaining within the meaning of Section 9(b) of the Act." (Consolidated Complaint ¶ 8; R. 2021)

NPC was specifically alleged to have violated Sections 8(a)(1) and 8(a)(5) of the Act, 29 U.S.C. §§ 158(a)(1), 158(a)(5), by "bargaining to impasse on a contractual provision which failed to sufficiently identify or define the collective bargaining unit or work of said employees so as to allow the Union to engage in meaningful collective bargaining regarding said employees or to otherwise represent said employees" (232 N.L.R.B. at 303, App. 67a).

The working conditions announced by NPC on February 2, 1976 were alleged to constitute unilateral changes not predicated upon a lawful impasse, thus further violating Sections 8(a)(1) and 8(a)(5) of the Act. Following several days of hearings, Administrative Law Judge ["ALJ"] Gerald A. Wacknov issued a comprehensive decision generally absolving NPC of wrongdoing, finding that the parties had reached a lawful impasse on January 21, 1976, principally due to their inability to resolve their work jurisdictional differences (232 N.L.R.B. at 307-08; App. 80a-84a).

The ALJ's analysis proceeded from a trisection of NPC's jurisdiction-unit proposal, the format of which was consistent with both the then expiring contract and the Union's initial proposal. As the ALJ observed "[r]educed to its component parts, the clause defines the appropriate unit for purposes of collective bargaining, es-

tablished the Union's jurisdictional boundaries, and operates as a management rights clause." (232 N.L.R.B. at 303; App. 67a). The unit-defining component of the clause, the ALJ found, "unequivocally sets forth an appropriate unit description." (*Id.*).[4] Indeed, "the practical effect of the proposed language" was found "to more carefully delimit the unit consistent with the realities of the working relationship between the parties through the years." (232 N.L.R.B. at 304; App. 70a). The jurisdictional component of the proposal was likewise found to be proper (232 N.L.R.B. at 304-05; App. 71a-72a), as was the management rights component (232 N.L.R.B. at 305-07); App. 72a-79a). The ALJ accordingly concluded that NPC had bargained in good faith and that a lawful impasse had resulted. (232 N.L.R.B. at 307-08); App. 80a-84a). He explicitly found, after a review of the entire course of negotiations, that NPC had not been motivated by anti-union animus and had not otherwise lacked good faith. (232 N.L.R.B. at 307; App. 79a). NPC's post-impasse changes, which were within the scope of its pre-impasse proposals, were thus lawful. (232 N.L.R.B. at 308-09; App. 84a-88a).

The General Counsel and the Union filed exceptions with the Board, challenging the findings and conclusions of the Administrative Law Judge. A three member Board panel, while essentially adopting the ALJ's subsidiary findings, disagreed with his construction of NPC's jurisdiction-unit proposal, his analytical methodology and legal conclusions. The Board did not disturb the ALJ's findings that the parties reached a bargaining impasse on January 21, 1976, principally due to their jurisdictional

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[4] The union definition component of the proposal was found to be "The . . . appropriate unit for collective bargaining is defined as including only those employees engaged in all work . . . in the Composing Room." (232 N.L.R.B. at 303 n.15; App. 67a). This construction was consistent with the unit definition set forth in the Consolidated Complaint quoted in the text, *ante* at p. 14, the appropriateness of which NPC made no effort to controvert.

differences. Contrary to the ALJ, however, the Board concluded that NPC's insistence to impasse upon its jurisdiction-unit proposal was unlawful for two reasons.

In the Board's view, NPC jurisdicti[illegible]-unit proposal could not "properly be analyzed by removing the management rights language," which the Board found "to be an integral part of the unit definition in that it allows [NPC] unilaterally to determine who is in the unit at any given time." (232 N.L.R.B. at 291; App. 25a). Moreover, the Board held that NPC had insisted to impasse over modification of the previously recognized bargaining unit definition, a permissive subject of bargaining, thereby tainting the impasse. (232 N.L.R.B. at 292; App. 26a).

The Board's remedial order contained provisions directing NPC to

> "(a) [r]estore and abide by the preexisting practices regarding . . . jurisdiction and management rights . . . as such matters were applied, operated, and interpreted under the collective bargaining agreement, ... [and]
>
> "(b) [u]pon request bargain collectively in good faith with [the Union] as the exclusive representative of its employees in the appropriate bargaining unit as defined in the most recent collective-bargaining agreement, with respect to wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement." (232 N.L.R.B. at 292, App. 28a).

D. The Judicial Proceedings Below

NPC timely petitioned the United States Court of Appeals for the Tenth Circuit pursuant to Section 10 (f) of the Act, 29 U.S.C. § 160(f), for review of the Board's decision and order. The Board cross-petitioned for enforcement of its order pursuant to Section 10(e) of the Act, 29 U.S.C. § 160(e), which petition the Union, as intervenor, supported.

A panel of the Court of Appeals sustained the Board and directed enforcement of its order without modification. Deferring to the Board's judgment, the Court below declined to disturb the Board's interpretation of NPC's proposal as according one party unilateral control over unit scope, hence "inherently inappropriate" (625 F.2d at 962; App. 12a). The court below agreed with the Board that, because the description or size of the collective bargaining unit is not a mandatory subject of bargaining, NPC's insistence to impasse on its jurisdiction-unit proposal was unlawful, notwithstanding the mandatory work jurisdiction and transfer components thereof. (625 F.2d at 963-64; App. 15a-16a). NPC's subjective good faith was rejected as a defense to the *per se* theory on which the case was tried. (625 F.2d at 963 n. 13; App. 14a). Having affirmed the Board's substantive conclusions, the court below upheld the resulting Board order, rejecting NPC's contention that the order compelled it to agree to substantive contract terms. (625 F.2d at 965; App. 19a).

REASONS FOR GRANTING THE WRIT

The questions presented are of exceptional importance, transcending the particular factual situation and parties involved below. The printing industry, particularly that phase of it engaged in the production of daily newspapers, is currently in the throes of a profound technological revolution. As the Eighth Circuit has observed, the stakes are high, for publishers view the new cold type technology as promising a significant reduction in the required complement of skilled personnel while the affected employees and their unions view the technology as a menace. *Omaha Typographical Union, No. 190* v. *N.L.R.B.*, 545 F.2d 1138, 1140-41 (8th Cir. 1976). The new technology impacts on the legal aspects of labor-management relations as well, for "one of the inherent by-products of automation is a blurring of the bargaining unit boundaries." *N.L.R.B.* v. *Columbia Tribune Publishing Co.*, 495 F.2d 1384, 1390 (8th Cir. 1974).

The thorny problems of adapting to automation are compounded for those in the newspaper industry by collective bargaining agreement language inextricably bound up in the work functions of a bygone era. The undersigned are advised that the jurisdiction-unit clause of the expired collective bargaining agreement here at issue is substantially identical to similar clauses currently incorporated in literally hundreds of collective bargaining agreements between newspaper publishing companies and local unions affiliated with the International Typographical Union. Indeed, the clause at issue here is viewed by the Board as defining "the traditional composing room unit" (232 N.L.R.B. at 291 n. 3; (App. 25a).[5]

The decision below consigns newspaper publishing companies to a prison bounded by verbal formalisms, for the ALJ's undisputed findings make it clear that NPC's proposed language was designed to "more carefully delimit the unit consistent with the realities of the working relationship through the years." (232 N.L.R.B. at 304; App. 70a). If the decision below goes unreviewed by this Court, publishers face the unacceptable choice between either reaffirming outmoded contract language under which, absent a willingness to trample upon employee

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[5] While the instant case is believed to be the first to have presented this issue for judicial review, a number of cases have been presented to the Board involving collective bargaining over cold type conversion in the face of the traditional jurisdiction-unit clause. *See, e.g., Newspaper Printing Corp.* [*Nashville, Tenn.*], 250 N.L.R.B. No. 132 (1980), *petition for review pending* (6th Cir. No. 80-1567); *Times-Herald, Inc.*, 249 N.L.R.B. No. 4 (1980); *Beaver County Times*, Case No. 6-CA-10976 (Gen. Counsel 1978); *Durham Herald Co.*, Case No. 11-CA-7979 (Gen. Counsel 1979); *Hopewell Publishing Co.*, Case No. 5-CA-11863 (Regional Dir. 1980); *Dothan Eagle Division of Thompson Newspapers, Inc.*, Case No. 15-CA-7412 (Regional Dir. 1980); *Truth Publishing Co.*, Case No. 25-CA-11545 (Regional Dir. 1980); *Texas Newspapers, Inc.*, Case No. 23-CA-6921 (Regional Dir. 1978).

rights of self-determination, they must turn their backs on modernization or inviting condemnation by the Board for seeking to negotiate contractual language more in keeping with the current state of the art. Were the only vice of the "traditional" jurisdiction-unit clause its antiquated terminology, a less substantial question of federal labor law would be involved. However, the open-ended unit definition and verbal intertwining of mandatory and nonmandatory subject matters expressed in that clause implicate core labor relations policy issues which should be settled by this Court.

A. The contract language proposed by Petitioner lawfully accommodated the historical working relationship between the parties with policies deeply rooted in the National Labor Relations Act—the self-determination rights of its other employees and its own right to preserve management prerogatives in the face of new technology adopted for valid business reasons. Petitioner's insistence to impasse upon that language and correlative refusal to reaffirm obsolete language verbatim did not *per se* amount to a refusal to bargain in good faith. The contrary decision below conflicts with the application of those core labor relations policies by this Court and other courts of appeal.

The cornerstone principle of the Act is the protection of employee rights of self-determination, including the right "to bargain collectively through representatives of their own choosing" and the concomitant "right to refrain from" collective bargaining. 29 U.S.C. § 157. The Board is charged with the responsibility of protecting those rights from attack by either employer or union. 29 U.S.C. §§ 158(a)(1), (b)(1)(A). And, once employees have elected to bargain collectively, their chosen representative and their employer have a mutual obligation "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . ." 29 U.S.C. § 158(d). Neither employer nor union can refuse to do so. 29 U.S.C. §§ 158

(a)(5), 158(b)(3).[6] Conversely, where employees have not selected a union to represent them in collective bargaining, the Act forbids their employer from recognizing and bargaining with the union, thereby forcing such representation upon the employees. 29 U.S.C. § 158(a)(2).

The principal vice of the jurisdiction-unit clause of the expired collective bargaining agreement lies in its potential for sweeping into the collective bargaining unit employees who have not chosen the Union to represent them. The court below quite correctly perceived this unit expansion potential, noting that the unit was defined

> "in terms of 'all composing room work', followed by a detailed, open-ended listing of job classifications and descriptions [thereby leaving] room for the contention that the unit included employees performing work beyond the physical confines of the composing room." (625 F.2d at 961 n. 9; App. 11a).

In negotiations for prior contracts, the unit expansion potential of that clause was of purely academic concern, for all "composing room work" had necessarily been done under the technologically static hot-type process within the composing room by composing room employees.

> "There is no record evidence in the instant case, nor did General Counsel or counsel for the Charging Party ever attempt to show, that the unit has ever, in practice, actually included employees performing work outside the composing room despite the contract language which would arguably permit such expansion; nor is there evidence that during the long collective-bargaining relationship under numerous working agreements there was ever a meet-

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[6] Under the Act, however, the Board does not "sit in judgment upon the substantive terms of collective bargaining agreements." *N.L.R.B.* v. *American Insurance Co.*, 343 U.S. 395, 404 (1952). Section 8(d) quite explicitly eschews imposing on either party any compulsion "to agree to a proposal" or requirement to "mak[e] a concession." 29 U.S.C. § 158(d).

> ing of the minds that the unit may encompass employees outside the composing room at some future date." (232 N.L.R.B. at 304; App. 69a-70a).

However, NPC's planned conversion to the cold-type process made unit expansion a very real threat, entailing, as it would, direct electronic transmission of editorial and advertising copy from NPC's editorial and advertising departments, respectively, to the general purpose computer to be used in conjunction with phototypesetting equipment in the composing room. The collective bargaining agreement terminology "composing room work" was relied upon by the Union as its predicate for a claim to representation of the employees in those remote departments assigned as part of their work to create and electronically transmit that copy. (232 N.L.R.B. at 304; App. 68a). Acutely aware of this defect, NPC refused to renew that language in the collective bargaining agreement which would control employee relations during and after the conversion.

The Board turned its back on this defect and the Section 7 rights of these employees, urging that the Union's unit expansion efforts were no defense (Board Brief at 19, n. 8).[7] In accepting the Board's position on that point

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[7] The Board compounds this error by purporting to "find the traditional composing room unit" recited in the jurisdiction-unit clause to be an appropriate unit for collective bargaining. (232 N.L.R.B. at 291 n.3; App. 25a), relying on *Columbia Tribune Publishing Co.*, 201 N.L.R.B. 535 (1973). While a virtually identical collective bargaining agreement provision was involved there, the Board ordered bargaining with respect to a unit defined as "[a]ll *employees in the composing room* at the Company's plant in Columbia, Missouri, *excluding* office clerical employees, guards and supervisors as defined in the Act, and all other employees." 201 N.L.R.B. at 538-39 (emphasis added). And, the instant case was prosecuted on the same theory, paragraph 8 of the Consolidated Complaint alleging that:

> "All *composing room employees* of Respondent employed at its Tulsa, Oklahoma, facility, including operators, makeup men,

(625 F.2d at 965, App. 17a-18a), the court below overlooked NPC's own liability for aiding the Union in the latter's quest for a larger collective bargaining unit. NPC quite properly resisted the Union's claim to representation of editorial and advertising department employees, for NPC would have itself violated Sections 8(a)(1) and 8(a)(2) of the Act, 29 U.S.C. §§ 158(a)(1) & (2), by acquiescing in the union's demand to continue the old language after conversion. *See Metromedia, Inc.* v. *N.L.R.B.*, 586 F.2d 1182 (8th Cir. 1978); *Graphic Arts International Union* v. *N.L.R.B.*, 505 F.2d 335 (D.C. Cir. 1974) ["*G.A.I.U.*"]. Those cases teach the analysis pertinent to evaluation of employer conduct in the face of technological alteration of the nature and flow of work in a multi-departmental/craft operation. Simply stated, an employer is barred by the Act from acceding to one union's demand to represent employees assigned to perform new work, for, as the court below acknowledged (625 F.2d at 962; App. 12a), employee rights of self-determination may not be bargained away by an employer.

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advertising makeup men, markup men, machinists, proofreaders, teletype operators, monotype operators, and apprentices, *excluding* office clerical employees, guards, watchmen and supervisors as defined in the Act, constitute an appropriate unit for the purpose of collective bargaining within the meaning of Section 9(b) of the Act." (R. 2021; ¶ 8) (emphasis added).

NPC did not controvert the appropriateness of this unit. Indeed, the presiding officer viewed a proferred amendment to the above-quoted definition as "very untimely", noting that "it certainly hasn't been litigated by [NPC]" (R. 712). When he indicated his intent to protect NPC's due process rights by recessing the proceedings to afford NPC an opportunity to meet the change, the General Counsel withdrew the amendment (R. 722-23).

Moreover, even if the Board's decision were procedurally unassailable, there is no record support for a finding that the editorial and advertising department personnel responsible for creating and electronically transmitting copy share a community of interest with composing room employees. Absent such evidence, the Board's order can not be enforced. *N.L.R.B.* v. *Meyer Label Co.*, 597 F.2d 18, 20 (2d Cir. 1979).

Thus, in *Metromedia*, the respondent television station acquired portable electronic video cameras known as "minicams" and agreed that the I.B.E.W., which then represented its studio cameramen, would represent the minicam operators. Notwithstanding I.B.E.W. contract language arguably including the minicam operators, the Eighth Circuit held that the employer was not privileged to concede their representation to I.B.E.W., for "minicam work was essentially new work and could not be controlled either by jurisdictional language or by a unit certification preexisting the contemplation of minicams." 586 F.2d at 1188. Similarly, the newspaper publisher in *G.A.I.U.*, preparing for conversion to a direct printing process which created a new form of work, negotiated a contract which recognized one union as the representative of employees who would be assigned to do that work. This premature contractual recognition, the District of Columbia Circuit held, violated the self-determination rights of those employees. 505 F.2d at 337-38.

The court below condemned NPC for refusing to agree to the open-ended jurisdiction-unit clause of the expired agreement. Yet, had NPC done just that, it would have violated the rights of its editorial and advertising department employees who had not then, and to this day have not, authorized the Union to represent them. Employees "should be given an opportunity to determine for themselves which union they wish to represent them, or whether they wish to reject union representation entirely." *Sheraton-Kauai Corp.* v. *N.L.R.B.*, 429 F.2d 1352, 1354 (9th Cir. 1970). NPC acted properly in seeking to more carefully delimit the unit consistent with the realities of the working relationship through the years, thereby respecting rights of composing room employees, who had chosen to be represented by the Union, and editorial and advertising department employees, who had not.

While *Metromedia* and *G.A.I.U.* detail the bargaining obligations imposed by the Act on employers like NPC

facing new technology, the court below gave no consideration to those obligations. The decision below reflects instead, a blind adherence to the concept that "modification in the *scope* of the bargaining unit, whether established by Board certification or voluntary recognition" is a permissive subject of bargaining. (625 F.2d at 963; App. 14a) (emphasis added). The Act, however, does not wed the parties to any particular form of words. An appropriate bargaining unit consists of a group of employees sharing a "community of interest;" neither employer nor union can, by mere manipulation of verbiage, create communities of interest which do not, in fact, exist or disregard communities of interest which do, in fact, exist.[8] The unit here for many years consisted of skilled craft employees who performed a series of interrelated functions necessary to convert copy from one tangible form to another. These employees worked in close physical proximity within the confines of the so-called composing room. There was no real possibility that their functions would be performed by others at remote locations so long as hot type technology was in use. With the conversion to computerized cold type technology, however, the basic conversion function would be wholly eliminated; advertising and editorial department personnel at remote locations electronically would generate and transmit signals which directly controlled photocomposition equipment. The work flow and assignments in the composing room would thereby be radically altered. To leave the bare words of

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[8] Proper bargaining unit analysis entails consideration of the totality of the workplace environment with an eye towards identifying those employee groups which have developed an identity of interests and commonality of concerns. *Meyer Label, supra,* 597 F.2d at 20-22. Among the practical indicia of such a community of interest which must be considered are physical proximity, identical lines of supervision, seniority, and promotion, uniform wage scales, working hours, and fringe benefit packages, shared use of company facilities, and frequent job interchanges. *Id.*

the old unit-defining language unchanged would have greatly expanded the actual scope of the bargaining unit; new words were required to preserve the true substance of the bargaining over the term of a successor-agreement.

The cryptic suggestion that contract language which accords one party unilateral control over unit scope "is inherently inappropriate" (625 F.2d at 962; App. 12a) reveals far too simplistic an approach in this sensitive area. An employer has the inherent management prerogative, absent a contractual provision in which it has bargained away the right, to subcontract work away from members of the bargaining unit. This Court so held in *Fibreboard Paper Products* v. *N.L.R.B.*, 379 U.S. 203 (1964), imposing upon the employer only the obligation to bargain with the union concerning the effects of that action. An employer's right to transfer work to its own employees outside the unit is similarly well established. *See Boeing Co.* v. *N.L.R.B.*, 581 F.2d 793, 796 (9th Cir. 1978); *University of Chicago* v. *N.L.R.B.*, 514 F.2d 942, 949 (7th Cir. 1975). The Ninth Circuit in *Boeing* properly distinguished between a unit definition describing those "certain 'people'" whom the union represents and a contractually agreed grant of work jurisdiction "reserving exclusively for the Union all 'functions' which might normally have been performed by those 'people.'" 581 F.2d at 796. It is of no significance that NPC here bargained to impasse to secure contract language confirming its ability to make mid-term transfers of work at its discretion as the cold type equipment was phased in, deleting at the same time the inconsistent exclusive work jurisdiction provisions of the expiring agreement. NPC simultaneously bargained extensively about the anticipated effects of the new technology and solicited the Union's proposal of specific job guarantees to ameliorate the financial burden on unit members. (232 N.L.R.B. at 297-301; App. 44a-59a). The Act requires no more.

As the above-cited cases teach, NPC was bound in negotiating with the chosen representatives of its composing room employees to respect the self-determination rights of its editorial and advertising department personnel, which the existing jurisdiction-unit clause would have overridden and at the same time was free to unshackle its management prerogatives from the strictures of that very clause. The decision below, however, condemns NPC's legitimate efforts to protect its employee's rights and assert its own inherent prerogatives. NPC was not motivated by anti-union animus and sought only to further the central policies of the Act.

If the decision below goes unreviewed, newspaper publishers, as well as employers in other technologically dynamic industries, must heed two conflicting directives. Faced with a union's insistence upon readopting outmoded and expansive unit-defining language, such employers are damned if they do (*Metromedia* and *G.A.I.U.*), damned if they don't (the decision below), and damned if they refuse to discuss the matter at all (29 U.S.C. § 158(d)). A writ of certiorari should issue so that this Court can settle these important, albeit now confused, issues of federal labor law.

B. The jurisdiction-unit clause of the expired collective bargaining agreement deals directly with substantive terms and conditions of employment which are mandatory subjects of collective bargaining. The judgment below enforces a Board order compelling Petitioner to reaffirm that language verbatim, thereby forcing agreement to substantive contractual provisions. The decision below thus squarely conflicts with this Court's seminal decision in *H. K. Porter Co.* v. *N.L.R.B.*, 397 U.S. 99 (1970).

It is apparent upon even cursory inspection that the jurisdiction-unit clause of the expired collective bargaining agreement grants the exclusive right to perform certain

work to the Union and restricts NPC in assigning that work. The clause opens with language reciting that the "jurisdiction of the Union" is thereby defined and closes with a sentence barring NPC from making any "other contract covering work as described above. . . ." (232 N.L.R.B. at 294 n. 1; App. 34a) The court below acknowledged that such work assignment matters are mandatory subjects of bargaining. (625 F.2d at 964; App. 15a-16a). NPC was privileged to bargain over revision or elimination of the jurisdictional aspects of that clause, notwithstanding the presence of unit-defining language in the same provision. No principle of federal labor law mandates that contract language bearing on both mandatory and permissive subjects of bargaining be deemed entirely permissive.

NPC does not here quarrel with the proposition that an impasse over both mandatory and permissive issues does not permit an employer to lawfully implement unilateral changes. However, paragraph 2(b) of the Board's order, which the court below enforced, amounts to a remedy which exceeds the bounds of the Board's remedial authority, as delimited by this Court in *H. K. Porter Co.* v. *N.L.R.B.*, 397 U.S. 99 (1970). That provision of the order is tantamount to a directive to agree to the jurisdiction-unit clause of the expired agreement, mandatory and permissive aspects alike.

As noted above, the statutory duty to bargain does not comprehend any compulsion to "agree to a proposal" or any requirement of "the making of a concession." 29 U.S.C. § 158(d.) This Court has clearly decreed that the legislative dichotomy between duty to bargain and obligation to agree bars the Board from "remedying" a refusal to bargain by compelling agreement on substantive terms. *H. K. Porter Co.*, 397 U.S. at 108. Indeed, unlike the instant case, this Court in *H. K. Porter* had before it an employer found by the Board to have been guilty of

bad-faith bargaining and to have been motivated by anti-union animus in its refusal to agree to deduct union dues from its employees' wages. Even under those more compelling circumstances, this Court set aside an order directing the employer to grant the union a dues check-off clause.

The court below found the *H.K. Porter* doctrine inapposite, on the ground that "[n]owhere in its order does the Board attempt to compel agreement on work placement or any other subject." (625 F.2d at 695; App. 19a). NPC respectfully disagrees, for the court below has misapprehended the significance of the Board's order. Close analysis of that order confirms that the Board has indeed overstepped its authority.

Paragraph 2(b) of the Board's Order requires NPC to bargain with the union

> "as the exclusive representative of its employees in the appropriate bargaining unit *as defined in the most recent collective-bargaining agreement*, with respect to wages, hours, and other terms and conditions of employment, and, if an understanding is reached, *embody such understanding in a signed agreement.*" (232 N.L.R.B. at 292; App. 28a) (emphasis added)

The Board purported to "find the traditional composing room unit set out in fn. 1 of the Administrative Law Judge's Decision" to define the unit appropriate for purposes of collective bargaining. (232 N.L.R.B. at 291 n. 3; App. 25a). However, the cited footnote merely quotes sections 2 and 3 of the parties' expired collective bargaining agreement, the latter section being the jurisdiction-unit clause discussed above, and was in no sense a finding by the Administrative Law Judge of any collective bargaining unit.[9] Indeed, Judge Wacknov's finding on this

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[9] Such a finding, had it been made, could not stand, for the unit issue was not litigated by the parties and the pertinent community of interest indicia were not developed for the record. *See* notes 7 and 8, *ante*.

issue was precisely to the contrary; it was NPC's contract proposal which "in fact, define[d] with particularity the appropriate collective bargaining unit." (232 N.L.R.B. at 304; App. 70a) (footnote omitted).

The import of the Board's order is to create an obligation to agree to the precise language of the expired jurisdiction-unit clause. Indeed, a more limited construction of the order cannot be squared with the conduct found below to have violated the Act—NPC's bare refusal to acquiesce in the Union's demand for verbatim renewal of the jurisdiction-unit clause of the expiring agreement. That order, while perhaps consistent with the Board's *per se* approach, is in conflict with the principles announced by this Court in *H. K. Porter*. The Board, by incorporating the jurisdiction-unit clause of the previous agreement into its bargaining order, impermissibly incorporated the substantive terms of that clause. This, *H. K. Porter* holds, is not a remedy which the Board may lawfully impose. Substantive terms and conditions of employment in a collective bargaining agreement provision may not, under the guise of a remedial order, be imposed on an employer. The presence of unit-defining terms in the same provision does not extend the Board's remedial authority. The court below thus decided a fundamental question of federal law in a way in conflict with an applicable decision of this Court; review should be granted to correct that error.

CONCLUSION

Newspaper publishing companies across the nation face the open-ended "traditional" jurisdiction-unit clause found in contracts negotiated with subordinate locals of the International Typographical Union during the hot metal era. As the computerized cold type technology comes on line, each of them must attempt to accommodate the interests of their composing room employees, who have

chosen one union to represent them, and those of their editorial and advertising department employees, who have not. Prior to the decision below, other courts of appeal had addressed the impact of automation on unit boundaries, delineating the respective bargaining obligations of employer and union consistent with the core policies of the Act. The conflicting decision below, however, injects confusion and uncertainty into this sensitive area of labor relations. A writ of certiorari should issue to settle this recurring and important question of federal labor law.

The court below compounded its unprecedented substantive analysis by refusing to confine the Board's remedial powers within the limits announced by this Court. A writ of certiorari should issue to conform the judgment below with the teachings of this Court.

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Respectfully submitted,

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